DOCKET NO. UWY CV 16-6029668 S	:	SUPERIOR COURT
ULYSES ALVAREZ	:	J.D. OF WATERBURY
V.	:	AT WATERBURY
CITY OF MIDDLETOWN	:	MARCH 16, 2018

MEMORANDUM OF DECISION
MOTION FOR SUMMARY JUDGMENT # 130

PROCEDURAL AND FACTUAL BACKGROUND

The plaintiff, Ulyses Alvarez, filed this complaint in two counts on January 25, 2016. The plaintiff named the City of Middletown as the defendant. The plaintiff alleges that the City of Middletown engaged in discrimination against him on the basis of race and national origin, which resulted in his discharge from the Middletown Police Department. The first count of the plaintiff's complaint alleges National Origin discrimination and the second count alleges racial discrimination. Both counts are brought pursuant to General Statutes § 46a-60 (a) (1).

The plaintiff's complaint, and the submitted record, reveals the following relevant facts. The plaintiff is a Hispanic American citizen of Puerto Rican descent residing in Waterbury, and was employed as a probationary police officer by the defendant. In October of 2013, the plaintiff applied to the defendant for a position as a police officer and went through the hiring process, which included a background check and an interview with the chief of police. The plaintiff alleges that while an employee of the defendant, Detective Thomas Ganley, was performing the plaintiff's background check he remarked that the plaintiff was "too clean," in reference to the plaintiff being a Puerto Rican from Waterbury. Nevertheless, the plaintiff's background check cleared and Ganley recommended the plaintiff move forward in the hiring process. Hence, the plaintiff was interviewed by Police Chief William McKenna. During the interview the plaintiff claims that McKenna asked him if the plaintiff had any "side bitches," or "baby mama drama," he should know about. Even so, shortly thereafter the plaintiff received a conditional offer of employment on November 13, 2013, provided he undergo training at the Police Officer Standards and Training Council (POST).

The plaintiff began attending POST on January 6, 2014. While there, the plaintiff was the only Hispanic cadet out of six recruits, and he alleges that he was subjected to racial slurs and derogatory language by some of his fellow trainees. Hence, the plaintiff graduated from POST on June 14, 2014, and he subsequently entered into the city's field training program. His supervising officer during this period made note of several performance deficiencies, including a lack of situational awareness, organizational issues, difficulty writing reports and various calls, and the plaintiff initially failed his firearms training. His schedule was adjusted in response. On November 12, 2014, the plaintiff was cleared to conduct patrol work on his own.

On February 4, 2015, a female citizen, Jane Doe[1], came into the police headquarters and reported that the plaintiff groped her and made her feel his genitals through his pants while he was responding to a reported domestic incident at her home. The plaintiff denied these allegations, but was placed on administrative leave on February 18, 2015, pending an internal affairs investigation. Detective Ganley was assigned to complete the investigation. During the course of his investigation, Officer Arroyo, a colleague of the plaintiff's made a statement to Ganley that, on the day on which the incident between the plaintiff and Jane Doe was alleged to have taken place, the plaintiff had met Arroyo for lunch and bragged to him that he had received oral sex from one of the individuals involved in the call he was on. The plaintiff denied making this statement but does not dispute that Arroyo reported such to Ganley.

While the investigation was ongoing, McKenna ordered a performance evaluation on the plaintiff, which showed he still demonstrated notable performance deficiencies, including a failure to file written reports. In light of these deficiencies on March 4, 2015, McKenna sent a letter to the plaintiff informing him that he would be facing probationary discharge on March 6, 2015. The plaintiff subsequently resigned on that same date. On May 4, 2015, the plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities (CHRO). On October 30, 2015 the plaintiff received a release of jurisdiction issued by CHRO.

[1] To protect the identity of the individual that made the complaint against the plaintiff both parties have referred to her throughout this action as "Jane Doe," and have redacted any mention of her identity from the record.

The plaintiff then initiated this action. The plaintiff alleges that his privilege of employment was interfered with on the basis of his race and national origin because a similarly situated Caucasian officer was not disciplined in the same manner, and comments were made to the plaintiff that he believes were racially motivated. Accordingly the plaintiff alleges that the defendant violated the Connecticut Fair Employment Practices Act, General Statutes § 46a-60 (a) (1).

On March 10, 2016, the defendant filed its answer and special defenses, and admitted that it employed the plaintiff as a probationary police officer and that an investigation was conducted, but otherwise denied that allegations of the plaintiff's complaint. On August 11, 2016, the plaintiff filed his reply.

On August 18, 2017, the defendant moved for summary judgment on the basis that the plaintiff cannot prove his prima facie case of discrimination On October 20, 2017, the plaintiff filed his objection. On December 22, 2017, the defendant filed a reply, and the plaintiff filed a supplemental objection. Finally, on January 5, 2018, the defendant filed another reply. In support of their positions, the plaintiff and defendant filed numerous exhibits. The matter was heard at the short calendar on January 8, 2018.

DISCUSSION

A. Legal Standard

Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Cefaratti* v. *Aranow,* 321 Conn. 637, 645, 138 A.3d 837 (2016). ". . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted.) *Wilson* v. *New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. ..As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . .When documents submitted

in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . Once the moving party has met the burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." *Ferri* v. *Powell-Ferri*, 317 Conn. 233, 228 A.3d 297 (2015).

In its memoranda in support of its motion for summary judgment, the defendant argues that the plaintiff has failed to state a prima facie case, and thus judgment should render for the defendants.[2] The defendant first contends that the plaintiff has failed to show that an adverse employment action has occurred, specifically, the defendant argues that the plaintiff has failed to show he was constructively discharged, as the plaintiff resigned prior to his termination. Next, the defendant asserts that, even assuming an adverse employment action occurred, the plaintiff cannot show an inference of discrimination as he has failed to show similarly situated comparators and only stray remarks from the

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[2] The defendant asserts that any claims or conduct asserted by the plaintiff that occurred prior to November 14 2014, 180 days from his CHRO complaint, are untimely and should not be considered pursuant to CFEPA, General Statutes § 46a-82 (f). General Statues §46a-82 governs the filing of a discrimination claim with the CHRO, and subsection (c) of that statute states in relevant part: "complaints filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination. . ." "[T]he failure to meet the 180 day time limit in § 46a-82(e) is [not] without consequence. . . [I]f a time requirement is deemed to be mandatory, it must be complied with, absent such factors as consent, waiver or equitable tolling. Thus, a complaint that is not filed within the mandatory time requirement is dismissable unless waiver, consent, or some other compelling equitable tolling doctrine applies. We conclude that the time limit of § 46a-82 (e) is mandatory, and thus the commission could properly dismiss the plaintiff's complaint if it was not filed within 180 days of the alleged act if discrimination." *Williams* v. *Commissioner of Human Rights & Opportunities*, 257 Conn. 258, 284, 777 A.2d 645 (2001).

In this case, there does not appear to be a separate and discrete cause of action alleged from conduct during this time, but the plaintiff does make note of statements by fellow trainees as well as statements that the plaintiff perceived as discriminatory by Ganley and McKenna during the hiring process. The plaintiff has not responded to or addressed this argument. In light of the above cited authorities, the court finds that any cause of action that could have been asserted arising directly from this conduct is time barred; however, the court will still consider these instances in determining whether the plaintiff has proven his prima facie case. See *Nelson* v. *Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-06-5001428-S (September 27, 2012, *Gilardi, J.T.R.*) (court considered time barred actions in determining prima facie case); *Downey* v. *Southern Natural Gas Co.*, 649 F.2d 302, 305 (5th Cir. 1981) (same).

basis of his action. Furthermore, the defendant contends that it had a legitimate reason for his discharge due to his serious performance deficiencies. Lastly, the defendant argues that the plaintiff cannot sow pretext, as similarly situated officers were disciplined and routine practice was followed in exercising his termination.

In his memoranda in opposition, the plaintiff asserts that he has stated a prima facie case and the defendant's motion should be denied. The plaintiff contends that he has suffered an adverse employment action, in that this discharge was inevitable as the decision regarding his termination had been made prior to his resignation. The plaintiff next contends that discrimination can be inferred through the following: (1) that the defendant has failed to discipline similarly situated individuals;(2) that several remarks were made to the plaintiff, by persons involved in his discharge, that were racially charged; and (3) that the ultimate decision to terminate the plaintiff's employment was based on impermissible stereotypes. Lastly the plaintiff asserts that the defendant's legitimate reason for his termination is a pretext, as the investigation against him was conducted in a biased manner, his performance was evaluated only after the accusation by Jane Doe, and similarly situated officers were not disciplined in the same manner.

A.

Prima Facie Case

"The framework this court employs in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973), and its progeny. . . . We look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both . . . .Under this analysis the employee must first make a prima facie case of discrimination. . . .The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question . . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision

actually was motivated by illegal discriminatory bias." (Citations omitted, internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73-74, 111 A.3d 453 (2015). Summary Judgment is appropriate where a plaintiff presents no evidence upon which a reasonable trier of fact could base a conclusion that race discrimination is a determinative factor in the adverse employment action. See *Schnabel* v. *Abramson,* 232 F.3d 83, 91(2d Cir. 2000).

The plaintiff brings this action under CFEPA, § 46a-60, et. seq., which prohibits discrimination based on , inter alia, race, color, and national origin. "In defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964 the federal statutory counterpart to §46a-60." *Britell* v. *Dept. of Correction,* 247 Conn. 148, 164, 717 A.2d 1254 (1998).

To determine whether a plaintiff has established a prima facie claim for discrimination pursuant to § 46a-60(a)(1), the court employs the burden shifting analysis set forth by the United States Supreme Court in *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. 802-04. See *Dept. of Transportation* v. *Commission on Human Rights & Opportunities* 272 Conn. 457, 463 n.9, 863 A.2d 204 (2005) ("[w]e note that the analytical framework set forth by the United States Supreme Court in McDonnell Douglas Corp. . .and its progeny is used to determine whether a complainant may prevail on a claim of disparate treatment under our state law." [Citation omitted]). Under the *McDonnell Douglas Corp.* analysis, "the employee must first make a prima facie case of discrimination. The employee may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision was actually motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport,* 304 Conn. 483, 513, 43 A.3d 69 (2012).

"The burden of establishing a prima facie case [of discrimination] is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the factfinder. . . The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a

jury verdict in the plaintiff's favor" (Internal quotation marks omitted.) *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.,* 170 Conn. App. 79, 87, 153 A.3d 687 (2017). "In order to establish a prima facie case, the [plaintiff] must prove that: (1) he is in the protected class, (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." (Internal quotation marks omitted.) *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 400, 880 A.2d 151 (2005). "In addition to proffering direct evidence of discrimination with respect to the fourth prong, a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than [he] was." (Internal quotation marks omitted.) *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, supra, 88.

The defendant does not dispute the first two prongs of the analysis that the plaintiff was a member of a protected class, nor that he was qualified for the position. Rather, the defendant disputes the remaining prongs.

The defendant first asserts that the plaintiff has failed to show that he was constructively discharged. Normally to prove a constructive discharge case a plaintiff must show that the employer intentionally created an intolerable work atmosphere that forces the employee to quit. See *Britell* v. *Dept. of Correction*, supra, 247 Conn. 178. Constructive discharge may also occur, however, if an employee "resigns in the face of inevitable termination." *Gorham* v. *Board of Education*, 7 F.Supp.3d 218, 232 (D.Conn. 2014). Furthermore, threats of termination may be sufficient to show constructive discharge. See *Dall* v. *St Catherine of Siena Medical Center*, 966 F. Supp. 2d 167, 178 (E.D.N.Y. 2013). In any event, the court declines to reach this issue, the plaintiff has not proven the other essential elements of his case. The plaintiff has not shown that the adverse employment action took place under circumstances giving rise to tan inference of discrimination; nor has he shown that the defendant's legitimate reason for his discharge is a pretext.

B.

Inference of Discrimination

Assuming an adverse action occurred; the plaintiff must show that it took place under circumstances giving rise to an inference of discrimination. "In regard to the fourth element of the plaintiff's prima facie case, circumstances that may give rise to an inference of discrimination are: (1) the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill the position; (2) the employer's criticism of the plaintiff's performance in ethnically degrading terms or invidious comments about others to the employee's protected group; (3) the more favorable treatment of employees not in the protected group; or (4) the sequence of events leading to the plaintiff's discharge or the timing of the discharge." *Snow* v. *Dari-Farms Ice Cream, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-10-6009422-S (February 13, 2013, *Sommer, J.*). "Nothing in McDonnell Douglas Corp. . . .limits the type of circumstantial evidence that may be used to establish the fourth prong of the test for a prima facie case of . . . discrimination." *Craine* v. *Trinity College*, 259 Conn. 625, 640-41, 791 A.2d 518 (2003).

To establish the [fourth] prong [of the prima facie case], a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than [he] was. . . To be probative, this evidence must establish that the plaintiff and the individuals to whom [he] seeks to compare [himself] were similarly situated in *all material respects* . . .[A]n employee offered for comparison will be deemed to be similarly situated in all material respects if (1) . . .the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) . . . the conduct for which the employer imposed discipline was of comparable seriousness." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 514. "[B]eing similarly situated in all material respects does not require one to demonstrate disparate treatment of an identically situated employee. . . Employees need show only a situation sufficiently similar to [their own] to support at least a minimal inference that the

difference of treatment may be attributable to discrimination." (Citation omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 212 226, 804 A.2d 1033, cert. denied, 262 Conn. 920, 812 A.2d 863 (2002).

"[T]o satisfy [the] 'all material respects' standard for being similarly situated, a plaintiff must show that [his] co-employees were subject to the same performance evaluation and discipline standards." (Internal quotation marks omitted.) *Kelly* v. *Sun Microsystems, Inc.* 520 F. Supp.2d 388, 390 (D.Conn. 2007). "In order for employees to be 'similarly situated' for the purposes of establishing a plaintiff's prima facie case, they. . . must have engaged in conduct similar to the plaintiff's." (Internal quotation marks omitted.) *Norville* v. *Staten Island University Hospital*, 196 F.3d 89, 96 (2d Cir. 1999). Although the allegedly similar circumstances "need not be identical. . .there should be a reasonably close resemblance of facts and circumstances." (Internal quotation marks omitted.) *Lizardo* v. *Denny's Inc.*, 270 F.3d 94, 101 (2d Cir. 2001). "[A] court can properly grant summary judgment . . .where it is clear that no reasonable jury could find the similarly situated prong met." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Paylan* v. *St. Mary's Hospital Corp.*, 118 Conn. App. 258, 268, 983 A. 2d 56 (2009). A plaintiff cannot selectively pick our one comparator when others are available. See *Simpson* v. *Kay Jewelers, Division of Sterling, Inc.*, 142 F. 3d 639, 646-47 (3d Cir. 1998) (holding that a "plaintiff cannot pick one comparator who was allegedly treated more favorably and completely ignore a significant group of comparators who were treated equally or less favorably.")

As to the relevancy of comments, "[i]n the absence of a clearly demonstrated nexus to an adverse employment action, stray workplace remarks are insufficient to defeat a summary judgment motion. . . It is well established that the stray remarks even of a decision maker, without more, cannot prove a claim of employment discrimination." (Citation omitted; internal quotation marks omitted.) *Chan* v. *Donahoe*, 63 F. Supp. 3d 271, 293-94 (E.D.N.Y. 2014).

In the present case, the plaintiff contends that discrimination can be inferred based upon the following: (1) that similarly situated comparators were not disciplined; (2) that remarks made to the

plaintiff evince a discriminatory animus; and (3) that the actions against the plaintiff were motivated by impermissible racial stereotypes. These arguments are unpersuasive.

The plaintiff first argues that a Caucasian police officer, Austin Smith, came to work smelling of alcohol, and that his employment was not terminated; rather, he was simply suspended. From this, the plaintiff argues a similarly situated employee of a different race and origin was disciplined more leniently. This comparison is ill suited. As previously noted, the plaintiff and the individual to whom he seeks to compare himself must be similarly situated "in all material respects." *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 514. Here, although the plaintiff and officer Smith were probationary officers, the conduct at issue is not of a sufficiently comparable nature. An odor of alcohol is not analogous to the conduct that formed the basis of the plaintiff's discharge, namely consistent performance deficiencies. See part II C of this memorandum of decision, See also *Walker* v. *Dept. of Children & Families*, 146 Conn. App. 863, 876, 80 A.3d 94 (2013), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014) (no disparate treatment where plaintiff failed to show comparators exhibited similar performance issues). Accordingly, the plaintiff has failed to show a similarly situated comparator from which discrimination can be inferred.

The plaintiff next argues that several remarks made to him during his employment give rise to an inference of discrimination. In his objection, the plaintiff points to the statements of two actors that he alleges displayed racial and national origin animus and that were involved in the decision to terminate his employment; these being: Ganley who conducted the investigation against the plaintiff, and McKenna who ultimately recommended the plaintiff's probationary discharge.[3]

[3] The plaintiff also references other comments made to him by fellow trainees during his time at POST, as well as statements by officers after his graduation. See Pl's Obj. 6-7 Docket #136. The plaintiff does not allege that these individuals, however, were involved in any adverse employment action against him, nor is there any basis in the record to conclude the same. While such evidence could be evidence of a hostile work environment action, such a claim is not pursued here, and would be time barred by the CHRO complaint; see footnote two; as well as by the fact that the lion's share of the allegedly discriminatory behavior occurred at a separate location outside the defendant's control, See *Velazquez* v. *Department of Correction*, Superior Court, judicial district of Fairfield, Docket No. CV 15-6051925-S (November 16, 2016, *Krumeich, J.*) (disparate incidents at different time and location by different persons time barred.) Accordingly, the only relevant comments are those addressed in the body of this decision.

The principal remarks identified by the plaintiff are as follows: The plaintiff testified in his deposition that Ganley, while conducting plaintiff's background check, stated the plaintiff was "too clean," specifically in reference to him being a Puerto Rican from Waterbury, Def.'s Exh. A (Alvarez Depo. 76: 17-25). The plaintiff also points to several comments posted by Ganley on Face book as purported proof of his discriminatory animus. See Pl's Obj. Docket #139. As to McKenna, the plaintiff states that while being interviewed prior to his entry into POST that McKenna asked him if he had any "side bitches," or "baby mama drama" should know about prior to hiring him. See Pl's Exh.1 (Alvarez Dep. 131: 6-15). The comments of each actor are considered in turn.

As to Ganley, these remarks are of little value to the court. The record shows that Ganley was not ultimately involved in the decision to end the plaintiff's employment, nor did he make a recommendation regarding the same. Def's Exh. Z (Ganley Dep., 24:15-18). Comments made by someone who did not make the adverse employment action, and that are not pertaining to the plaintiffs discharge, are of little probative worth. See *Dixon* v. *International Federation of Accountants*, 416 Fed. Appx. 107, 110 (2d Cir. 2011) (remark by supervisor that was not involved in termination of plaintiff's employment was insufficient to prove prima facie case). Moreover, the plaintiff has not identified other racially charged language, or behavior, that Ganley exhibited specifically towards him. Furthermore, that Ganley ultimately recommended the plaintiff move forward in the hiring process; Def's Exh J. (Ganley Affidavit); militates against the conclusion that he harbored a discriminatory animus against him.

Nonetheless, the plaintiff argues that Ganley was motivated by racial stereotypes in conducting his investigation regarding Jane Doe's complaint, and that, by crediting Jane Doe and Officer Arroyo's statements over those of the plaintiff, Ganley displayed racial animus. This argument, however, is belied by the reality that Ganley credited Arroyo's testimony and Arroyo himself is of Puerto Rican descent. See Def's Exh Y (Defendant's Responses to Interrogatories). Accordingly, the mere fact that Ganley credited Arroyo and Doe over the plaintiff does not provide evidence of discrimination. Furthermore,

the investigation conducted by Ganley is ultimately irrelevant, in so far as the decision to terminate the plaintiff was made before the investigation was even completed based upon the plaintiff's performance deficiencies. As noted in Chief McKenna's letter of March 3, 2015, he recommended the plaintiff's discharge for a number of performance deficiencies and concluded by stating: "The pending internal investigation may add additional reasons to support my reasons to recommend discharge." Pl's Exh. 9 (McKenna's letter to Mayor Drew, Pl's Exh 9). Accordingly, only McKenna's statements and actions towards the plaintiff are relevant.

As to McKenna, this language while questionable, ultimately fails to give rise to an inference of discrimination. McKenna disputes making these comments, but even assuming they occurred these comments, although tasteless, do not directly reference race, and could possibly be construed as crude attempts at humor. See *Jackson* v. *Post University Inc.*, 836 F. Supp. 2d 65 (D. Conn.2011)(comments in reference to African American plaintiff purportedly smoking marijuana not sufficient to give rise to inference of discrimination). That this is the only specific identified behavior on the part of McKenna that the plaintiff has identified leads to the conclusion that this is nothing more than a stray remark unrelated to the plaintiff's discharge, and as such, is insufficient to avoid summary judgment. See *Chan* v *Donahoe*, supra, 63 F. sup. 3d 293-94.

Furthermore, the court finds that the same actor inference applies here. "When the same actor hires a person already within the protected class, and then later fires the same person, it is difficult to impute to h[im] an invidious motivation that would be inconsistent with the decision to hire." (Internal quotation marks omitted.) *Carlton* v. *Mystic Transport Inc.*, 202 F.3d 129, 137 (2d Cir. 2000), cert. denied, 530 U. S. 1261, 120 S. Ct. 2718, 147 L. Ed. 2d 983 (2000). While the ultimate decision to hire or fire the plaintiff was vested in the mayor, McKenna recommended the plaintiff's hiring as well as his ultimate discharge within the relatively brief period of time he was employed by the City of Middletown, a little less than one and a half years. See *Jackson* v. *Post University, Inc.,* supra, 836 F. Supp. 2d 99 (application of same actor inference). Accordingly, in light of the foregoing, thee comments are

insufficient to show an inference of discrimination.

Lastly, the plaintiff argues that the decision to terminate his employment was motivated by impermissible stereotypes. Leaving aside that the plaintiff's performance issues were well documented; see part II C of this memorandum of decision; and that the line of cases the plaintiff relies upon deal entirely with gender discrimination, this argument is unavailing and unsupported by any evidence. The plaintiff asserts that the McKenna decision to terminate the plaintiff's employment was based upon impermissible stereotypes, because in his letter to Mayor Drew recommending discharge he referred to various performance deficiencies the plaintiff exhibited. Specifically, McKenna wrote that it appeared the plaintiff could not grasp the department's directives or training attempts, and that he was perhaps being defiant in his refusal to learn. Pl's Exh9 (Letter from McKenna to Mayor Drew). The plaintiff contends that "these statements implicate a known stereotype of Hispanics: lack of intelligence." Pl's Objection p. 24, Docket #136. This argument, however, is conclusory and based entirely on speculation. "No genuine issue of material fact [is created] where [the] plaintiff [relies] on conclusory statements and personal assessment of the motives of the defendants in opposing summary judgment." (Internal quotation marks omitted.) *Marasco* v. *Connecticut Regional Vocational Technical School System*, 153 Conn. App. 146, 164, 100 A.3d 930 (2014), cert. denied, 316 Conn. 901, 111 A.3d 469 (2015). Accordingly, the plaintiff has failed to show an inference of discrimination.

C.

Legitimate, Non-Discriminatory Reason & Pretext

Even assuming, arguendo, that an inference of discrimination exists, the defendant has a legitimate non-discriminatory reason for the plaintiff's termination and the plaintiff has not shown that it is a pretext.

If the plaintiff establishes a prima facie case of discrimination, then the burden of production shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for its action. *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. 802. "The employer may . . . rebut the prima facie case by

stating a legitimate, nondiscriminatory justification for the employment decision in question." *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 74. "This, too, is a burden of production, and the [employer] merely needs to state a nondiscriminatory reason." *Craine* v. *Trinity College* supra, 259 Conn. 643.

The defendant asserts that the legitimate, nondiscriminatory reason for terminating the plaintiff's employment was namely his pervasive performance deficiencies. The plaintiff does not contest these deficiencies. Pl's Objection p. 16 Docket #136. Aspects of the plaintiff's performance as an officer that were found to be deficient included: (1) that he initially failed his firearms training, and his schedule to complete the field training program had to be adjusted on several occasions to compensate, Def's Exh U (McKenna Dep., 53:5-16, 54:2-55:3); (2) that he had situational awareness issues, Pl's Exh 9 (McKenna's letter recommending plaintiff's discharge), Def's Exh I (Lukanik Memo RE: Alvarez Performance); (3) that he exhibited organizational issues and had difficulty remembering calls, id.; (4) that he had problems with reporting motor vehicle accidents correctly and showed an inability to recognize who was at fault, id.; (5) that he failed to write reports for fourteen calls that warranted a written report, Def's Exh U (McKenna Dep., 55:4-9); and (6) that on three other occasions he had written inadequate reports, and had failed to fully investigate and collect relevant information relating to these cases. Def's Exh. I (Lukanik Memo RE: Alvarez) Def's Exh. U (McKenna Dep., 55: 4-9). Furthermore, that the plaintiff failed to write a report on the incident that gave rise to Jane Doe's complaint; Def's Exh. K p. 39 (Internal Affairs Memo RE: Jane Doe); and his purported statements to Officer Arroyo, provided additional reasons for discharge. Accordingly, the defendant has set forth a legitimate nondiscriminatory reason for the plaintiff to show pretext.

"After the [employee] has established a prima facie case, and the [employer] has produced evidence of a legitimate, nondiscriminatory reason for the employment action, [t]he [employee] retains the burden of persuasion. [The employee] now must have the opportunity to demonstrate that the [employer's] proffered reason was not true for the employment decision (Internal quotation marks omitted.) *Harris* v. *Dept. of Correction*, 154 Conn. App. 425, 431, 107 A.3d 454 (2014), cert. denied, 315

Conn. 925, 104 A.3d 921 (2015). To show pretext, the plaintiff must demonstrate that the defendant was motivated by an unlawful animus or that the defendant's explanation is unworthy of credence. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The plaintiff must present "sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the employment action." *Weinstock* v. *Columbia University*, 224 F.3d 33, 42 (2d Cir. 2000), cert. denied, 540 U.S. 811, 124 S. Ct. 53, 157 L. Ed. 2d 24 (2003).

The plaintiff has failed to put forth evidence demonstrating that the defendant's reasons for terminating him were pretextual. The plaintiff sets forth several arguments regarding pretext.

First, the plaintiff contends that Ganley's investigation was motivated by discriminatory animus evidenced by his manner conducting the investigation and his determination of the plaintiff's credibility. This argument is unpersuasive, however, as Ganley was ultimately not a decision maker regarding the plaintiff's employment and credited a fellow Hispanic officer over the plaintiff. See Part IIB of this memorandum of decision. The plaintiff makes note of the fact that after the investigation was opened, the plaintiff's performance was taken under scrutiny. This, however, is of no consequence. That performance investigation was conducted by an independent officer, Lukanik, who the plaintiff does not allege engaged in discriminatory behavior. Furthermore, the complaint that gave rise to the investigation did not originate within the police department, but rather was made by a civilian. Lastly, as noted previously, the decision to terminate the plaintiff's employment was ultimately made on the basis of the plaintiff's deficient performance. Pl's Exh. 9 (Letter to Mayor Drew from Chief McKenna).

Second, the plaintiff contends that failing to properly document incidents is a "continuing and widespread problem throughout the departments." Pl's Exh. 5 (Ganley's Internal Affairs Report p. 40). Consequently, the plaintiff contends that by disciplining him for such conduct, he was singled out on the basis of his race. This, however, is a misstatement of fact. As noted by McKenna, officers have been disciplined on multiple occasions for failing to properly report incidents. Def's Exh. U (McKenna Dep.

28:1-31). Furthermore, it was noted that a Caucasian probationary police officer was terminated during his probationary period for failing to properly document reports and for disrespecting his supervisors. Id. Consequently, the plaintiff has proffered no evidence from which the court can infer he was singled out.

Third, and lastly, the plaintiff contends that the defendant deviated from practice in terminating his employment, rather than working to rehabilitate him. The plaintiff points to testimony of McKenna which indicates that the defendant will often work with an officer who is exhibiting performance deficiencies to correct them. Pl's Exh. 15 (McKenna Dep. 36:8-48:5). This argument, however, is belied by the reality that the plaintiff did receive supplemental training to correct his performance deficiencies. The plaintiff was given 624 hours of training, in contrast to the usual 480 hours, before his superior officers felt he was ready to patrol on his own. See Pl's Exh. 9. See also Def's Exh. E-1 (Lukanik memos documenting persistent performance issues by the plaintiff and ameliorative efforts). Consequently, when the defendant decided to terminate the plaintiff's employment in light of these long-standing, and seemingly uncorrectable, performance deficiencies it did not deviate from practice, particularly in light of the fact that similarly situated officers have been discharged. See Def's Exh. U (McKenna Dep. 28-31). Thus the plaintiff has failed to demonstrate pretext.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted.

THE COURT

Brazzel-Massaro, J.

Copies mailed to:
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3/16/18